MICHAEL RODAK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

No. 80-11

J. GREGORY MERRION, et al.,

Petitioners,

v.

JICARILLA APACHE TRIBE, et al.,

Respondents.

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

I. Does the authority of an Indian Tribe to tax non-members, when on Indian land within a reservation, derive solely from the tribal power to exclude those non-members from that land, and the concomitant power to establish conditions for their entry upon such land?

II. If the answer to Question I is in the affirmative, may an Indian Tribe exercise that power to exclude a non-member from Indian land within a reservation for failure to pay a tribal tax, under the following circumstances:

(1) The non-member has entered upon the Indian land and undertaken commercial activities there pursuant to a lease agreement with the Tribe which has been authorized by a federal statute and approved by the Secretary of Interior in accordance with that statute;

(2) The lease agreement does not include payment of the Tribal tax as a condition of remaining in possession and continuing the commercial activities authorized by the lease agreement; and

(3) The non-member is in full compliance with all terms and conditions of the lease agreement?

INTEREST OF THE STATE OF WASHINGTON

The interest of the State of Washington does not stem from any desire to deprive Indian Tribes of tax revenues, be those revenues from oil and gas production or from any other commercial activity taking place on Indian lands. Nor is our interest the preservation of our own tax base, as it was in *Washington v. Confederated Tribes of the Colville Reservation*, ... U.S. ..... (June 10, 1980, No. 78-630). This Court's decision in *Colville* has removed our concern in that regard, by rejecting the proposition a state's taxing power can be preempted by tribal taxing power; and thus we need not challenge a Tribe's taxing power to preserve the State's.

Indeed, we do not view this case as primarily a tax case at all. Yet the issues that concern us arise from a portion of this Court's opinion in *Colville*, *i.e.*, its discussion of tribal taxing power over non-Indians. (Slip. Op. 15-17.) Though the holding is entirely clear—the Colville Tribe's cigarette tax on

non-Indian purchasers is valid—the grounds for the holding are less clear. The Court's discussion appears to base this taxing power upon the tribal power to condition entry upon Indian lands, and to exclude non-members for failure to comply with those conditions. The discussion expressly applies this taxing power to non-members, and to transactions involving non-members, only when located on *Indian* lands; further the discussion relies upon lower court decisions and opinions of the U.S. Attorney General which are themselves based upon the tribal right to condition entry upon Indian lands. The Court, in short, appears to have answered the first of our two "Questions Presented" in the affirmative. And that is certainly the correct answer.

The Court's citation of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978) casts, however, a shade of doubt upon that answer—a doubt which the various Indian tribes will surely be quick to exploit. One can fully expect the tribes to argue, in this case or in subsequent cases, that tribal taxing power over non-Indians is part of their retained inherent sovereignty affirmed in *Wheeler*, and is unaffected by this Court's decision in *Oliphant*.

If this argument is accepted, non-members would be subject to the general regulatory power of a tribal government in which they cannot participate. And the State of Washington's interest in protecting its citizens from such power is obvious. For what is at stake is not just taxing power over non-members, but a broad range of regulatory power, including land-use controls over non-Indian lands located within a reservation boundary, control over non-Indian fish-

ing and hunting on such lands,[1] and a whole host of other types of regulations. *Cf., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) for a discussion of the constitutional problems presented by any such system of government in which the persons governed cannot participate.

Hence our interest in having this Court make it absolutely clear in this case that the tribal power to tax non-members, or to regulate their conduct rests solely upon the tribal power to exclude those non-members from Indian lands, and the concomitant power to impose conditions upon entry.

Once that is done, however, an additional concern remains; this involves the second of the "Questions Presented". The State and some of its counties have possessory interests in many parcels of Indian land. Some of these possessory interests are easements for public roads; others are leasehold interests in Indian lands used by the State for public parks.

If a Tribe can impose upon the holder of such possessory interests a condition not included or provided for in the written instrument, and then exclude the holder from Indian lands for failure to comply with that condition, the possessory interest can become a nullity. The new condition might be a tax or a fee; or it might be something entirely non-monetary, such as a restriction on hours of use, or a speed limit different from state or local speed limits.

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[1]This question of tribal control over non-Indian hunting and fishing on non-Indian lands is, of course, now before this Court in *Montana v. United States* (cert. granted April 13, 1980), No. 79-1128. In our amicus brief filed in that case, at pp. 14-29, we discuss extensively the issues involved in the first of the two "Questions Presented" here, i.e., the precise source of Tribal power over non-Indians; for those issues are involved in *Montana* as well. We would refer the Court to our discussion there rather than attempt to repeat it here. Accordingly, the principal focus here is on the second of the two "Questions Presented," rather than the first. Though *Montana* may well dispose of the first, it will not dispose of the second.

If the instrument itself imposes that condition, or allows the Tribe to impose it, as it might choose, there is no cause for complaint, of course. But if the terms of the instrument can in effect be changed, then the possessory interest can be made a practical nullity by the unilateral decision of the Tribe. The power of the Tribe to make changes of this sort, and to expel non-members for failure to comply with them, is the basic issue here. If the Jacarilla Apache Tribe can expel the Petitioners in this case from its lands, for failure to pay a tax not authorized by the oil and gas leases into which they have entered, the easements and leaseholds held by the State of Washington for the benefit of the general public will obviously be of dubious value.

REASONS FOR GRANTING THE WRIT

The Jacarilla Apache Tribe of Indians resides on an Executive Order Reservation, located within the State of New Mexico. The Petitioners are engaged in the production of oil and gas from Tribal lands under oil and gas leases issued with the approval of the Tribal Council and the Secretary of the Interior, pursuant to 25 U.S.C. §§ 398a and 398.

On July 9, 1976, the Tribal Council adopted its Oil and Gas Severance Tax. (Pet. Cert. App. I, pp. 120-125). As we understand the record, most, if not all, of the oil and gas leases were issued before the adoption of the tribal tax, and none of the leases contain a requirement that any such tax must be paid. At issue is the validity of that tax, under these circumstances.

As already stated, we do not dispute the general power of a Tribe to impose conditions upon the entry of non-members on Indian lands located within a res-

ervation, and to exclude non-members for failure to comply with those conditions. Further, those Indian lands may include not just tribally owned lands, but lands owned by individual tribal members. Nor, as already pointed out, do we dispute the proposition that these conditions imposed by the Tribe may include payment of fees or taxes.

But what is the effect upon that tribal power to impose such conditions, and to exclude for non-compliance with those conditions, when the non-member holds a lease issued pursuant to a statute such as 25 U.S.C. § 398a? That section provides:

> "Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in the Act of May 29, 1924 (Forty-third Statutes, page 244) [25 USC § 398]."

And section 398, in turn, provides in pertinent part:

> "Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage reservation subject to lease for mining purposes for a period of ten years under section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, page 795) [25 USC § 397] may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: * * *"

When Congress used the term "lease" in statutes such as these, it intended, we submit, to authorize leases as understood by lawyer and layman alike: i.e., agreements under which the lessee is entitled to remain in possession *so long as the lessee complies with the terms and conditions contained in that agreement.* If an Indian Tribe can impose upon the lessee conditions not provided for in the lease, and eject the lessee for failure to comply with those conditions, then the lease is not, we submit, really a lease at all. It is a sham lease.

The basic issues in this case can be put quite bluntly: Did Congress intend that leases authorized by 25 U.S.C. §§ 398 and 398a be sham leases? Or did Congress intend that they be real leases, which confer a continuing right of possession so long as the terms and conditions in the lease are met?

The great importance of this question can be seen by an examination of the many statutes which under terms and conditions approved by the Secretary of Interior authorize the leasing of Indian lands. See, 25 U.S.C. §§ 380, 395, 396, 397, 398, 398a, 399, 400, 400a, 401, 402, 402a, 403, 403a, 403b. In addition to these statutes are those authorizing the granting various sorts of easements or rights of way, such as 25 U.S.C. §§ 321 and 323. The effect of these statutes is here involved as well. As an examination of these statutes will show, easements and leases can be issued for many purposes other than oil and gas production; those purposes can range from coal mining, to cattle grazing, to provision of ordinary residences. Existing easements and leases issued pursuant to these statutes must certainly be numbered in the thousands, nation-wide.

The protection which these leases and easements, and the statutes which authorize them, afford to the holder is the critical issue in this case, as we view it. And that issue is of sufficient importance to merit full review by this Court.

Respectfully submitted,

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